

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TIMOTHY SAVAGE,)	
)	No. CV-05-362-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND DIRECTING AN IMMEDIATE
JO ANNE B. BARNHART,)	AWARD OF BENEFITS
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 9, 13) submitted for disposition without oral argument on May 8, 2006. Also before the court is Defendant's Motion to file an overlength brief. (Ct. Rec. 12.) Attorney Rebecca M. Coufal represents Plaintiff; Special Assistant United States Attorney Franco L. Becia represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 3.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands for an immediate award of benefits.

1 Plaintiff, 58-year-old Vietnam veteran¹ at the time of alleged
2 onset date and 63-years-old at the time of the second administrative
3 decision following remand by the Appeals Council, completed 13 years
4 of education and had past work experience as a radiator mechanic for
5 25 years with the same employer. Plaintiff filed an application for
6 Social Security disability benefits on March 28, 2001, alleging
7 disability as of November 17, 1999, due to physical and mental
8 impairments. Following a denial of benefits at the initial stage
9 and on reconsideration, a hearing was held before Administrative Law
10 Judge Mary Bennett Reed (ALJ). On July 25, 2002, the ALJ denied
11 benefits; the cause was remanded by the Appeals Council on June 25,
12 2003. A supplemental administrative hearing was held; the ALJ
13 denied benefits on April 11, 2005. Review was denied by the Appeals
14 Council. This appeal followed. Jurisdiction is appropriate
15 pursuant to 42 U.S.C. § 405(g).

16 ADMINISTRATIVE DECISION

17 The ALJ concluded Plaintiff met the non-disability requirements
18 and was insured for benefits through December 31, 2004. (Tr. at
19 57.) Plaintiff had not engaged in substantial gainful activity and
20 suffered from severe impairments, including musculoskeletal and
21

22 ¹The record indicates Plaintiff, then 23-years-old, served as
23 a member of the Marine Corps infantry in Vietnam, saw significant
24 combat throughout his tour, witnessed the death and serious wounding
25 of 24 platoon members during Operation Hastings. He was one of six
26 who survived without serious wounds and was awarded the Purple
27 Heart. (Tr. at 158, 159.) Plaintiff was discharged in 1969 for
28 medical reasons due to labile hypertension. (Tr. at 151.)

1 visual limitations but those impairments were not found to meet the
2 Listings. The ALJ found Plaintiff did not suffer from severe mental
3 impairments, and concluded Plaintiff's testimony was not fully
4 credible. The ALJ determined Plaintiff had the residual capacity
5 for a wide range of light work with additional postural and visual
6 limitations. (Tr. at 57.) The ALJ concluded Plaintiff could return
7 to his past relevant work as a radiator mechanic and, therefore, was
8 not disabled.

9 ISSUES

10 The question presented is whether there was substantial
11 evidence to support the ALJ's decision denying benefits and, if so,
12 whether that decision was based on proper legal standards.
13 Plaintiff contends the ALJ erred when (1) finding his mental
14 impairment was not severe, rejecting the opinions of the treating
15 psychiatrist and the Veteran's Administration's disability rating
16 and relying on the opinion of the consulting and examining mental
17 health experts; and (2) rejecting his testimony without clear and
18 convincing reasons. Having concluded there was error with respect
19 to the first issue, the court does not address the second.

20 STANDARD OF REVIEW

21 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
22 court set out the standard of review:

23 The decision of the Commissioner may be reversed only if
24 it is not supported by substantial evidence or if it is
25 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
26 1097 (9th Cir. 1999). Substantial evidence is defined as
27 being more than a mere scintilla, but less than a
28 preponderance. *Id.* at 1098. Put another way, substantial
evidence is such relevant evidence as a reasonable mind
might accept as adequate to support a conclusion.
Richardson v. Perales, 402 U.S. 389, 401 (1971). If the
evidence is susceptible to more than one rational
interpretation, the court may not substitute its judgment

1 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
2 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599
(9th Cir. 1999).

3 The ALJ is responsible for determining credibility,
4 resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
5 Cir. 1995). The ALJ's determinations of law are reviewed
6 *de novo*, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

7 SEQUENTIAL PROCESS

8 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
9 requirements necessary to establish disability:

10 Under the Social Security Act, individuals who are
11 "under a disability" are eligible to receive benefits. 42
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
12 medically determinable physical or mental impairment"
which prevents one from engaging "in any substantial
13 gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
14 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
from "anatomical, physiological, or psychological
15 abnormalities which are demonstrable by medically
acceptable clinical and laboratory diagnostic techniques."
16 42 U.S.C. § 423(d)(3). The Act also provides that a
claimant will be eligible for benefits only if his
17 impairments "are of such severity that he is not only
unable to do his previous work but cannot, considering his
18 age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
19 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
20 vocational components.

21 In evaluating whether a claimant suffers from a
disability, an ALJ must apply a five-step sequential
22 inquiry addressing both components of the definition,
until a question is answered affirmatively or negatively
in such a way that an ultimate determination can be made.
23 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
claimant bears the burden of proving that [s]he is
24 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
1999). This requires the presentation of "complete and
25 detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
26 404.1512(a)-(b), 404.1513(d)).

1 v. *Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the
2 Commissioner has passed regulations which guide dismissal of claims
3 at step two. Those regulations state an impairment may be found to
4 be not severe *only* when evidence establishes a "slight abnormality"
5 on an individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303,
6 306 (9th Cir. 1988) (citing Social Security Ruling 85-28). The ALJ
7 must consider the combined effect of all of the claimant's
8 impairments on the ability to function, without regard to whether
9 each alone was sufficiently severe. See 42 U.S.C. § 423(d)(2)(B)
10 (Supp. III 1991). The step two inquiry is a *de minimis* screening
11 device to dispose of groundless or frivolous claims. *Bowen v.*
12 *Yuckert*, 482 U.S. 137, 153-154.

13 The opinion of a non-examining physician may be accepted as
14 substantial evidence if it is supported by other evidence in the
15 record and is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035,
16 1043 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th
17 Cir. 1995). The opinion of a non-examining physician cannot by
18 itself constitute substantial evidence that justifies the rejection
19 of the opinion of either an examining physician or a treating
20 physician. *Lester*, at 831, citing *Pitzer v. Sullivan*, 908 F.2d 502,
21 506 n.4 (9th Cir. 1990). Cases have upheld rejection of an
22 examining or treating physician based in part on the testimony of a
23 non-examining medical advisor; but those opinions have also included
24 reasons to reject the opinions of examining and treating physicians
25 that were independent of the non-examining doctor's opinion.
26 *Lester*, at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55
27 (9th Cir. 1989) (reliance on laboratory test results, contrary
28 reports from examining physicians and testimony from claimant that

1 conflicted with treating physician's opinion); *Andrews*, 53 F.3d at
2 1043 (conflict with opinions of five non-examining mental health
3 professionals, testimony of claimant and medical reports); *Roberts*
4 *v. Shalala*, 66 F.3d 179 (9th Cir 1995) (rejection of examining
5 psychologist's functional assessment which conflicted with his own
6 written report and test results). Thus, case law requires not only
7 an opinion from the consulting physician but also substantial
8 evidence (more than a mere scintilla, but less than a
9 preponderance), independent of that opinion which supports the
10 rejection of contrary conclusions by examining or treating
11 physicians. *Andrews*, 53 F.3d at 1039.

12 The ALJ rejected the conclusion by Dr. Edwards that Plaintiff
13 was disabled due to PTSD, relying, instead, on the opinion of
14 consulting psychologist Bostwick, who concluded, although the
15 diagnosis was severe, the functional limitations (B criteria) were
16 mild. (Tr. at 585, 593.) There is some basis in the record to
17 support this conclusion. Clinic notes from the VA treating
18 psychiatrist, an expert in combat related PTSD, note improvement
19 with medication, at least in nighttime sleep patterns. (Tr. at 260,
20 366, 353.) Moreover, Plaintiff testified he has been active in the
21 community, participating in Boy Scout and VFW activities and a men's
22 church group, as well as volunteering to catalog veterans buried at
23 the local cemetery. (Tr. at 576, 579.) Additionally, the record
24 reflects he traveled successfully to Ireland for vacation and to the
25 southwest to assist a friend with moving. (Tr. at 219, 482.) Those
26 successes were reflected in findings by the examining physician, Dr.
27 McKnight, and consultant Dr. Bostwick. Dr. McKnight opined
28 Plaintiff's PTSD was non-severe, his global assessment of

1 functioning was measured at 65-70, and any limitations were mild.
2 (Tr. at 173-179.)

3 PTSD is defined as,

4 [T]he development of characteristic symptoms following
5 exposure to an extreme traumatic stressor involving direct
6 personal experience of an event that involves actual or
7 threatened death or serious injury, or other threat to
8 one's physical integrity; or witnessing an event that
9 involves death, injury, or threat to the physical
integrity of another person; or learning about unexpected
or violent death, serious harm, or threat of death or
injury experienced by a family member or other close
associate.... The person's response to the event must
involve intense fear, helplessness, or horror.

10 AMERICAN PSYCHIATRIC ASS'N DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS at
11 424 (4th ed. 1994) (DSM-IV). Also associated with PTSD are the
12 following diagnostic criteria: Persistent avoidance of stimuli
13 associated with the trauma as indicated by efforts to avoid
14 activities, places, or people that arouse recollection of the
15 trauma, feelings of detachment or estrangement from others, and
16 restricted range of affect. DSM-IV at 428. Additionally, there
17 must be persistent symptoms of increased arousal, including
18 difficulty falling or staying asleep, irritability or outbursts of
19 anger, difficulty concentrating, hypervigilance, and exaggerated
20 startle response. DSM-IV at 428. Dr. Bostwick admitted and the ALJ
21 found neither he nor Dr. McKnight were experts in combat related
22 PTSD, and that Dr. McKnight's opinion had not addressed Plaintiff's
23 Vietnam experience in any detail. (Tr. at 55, 515, 521, 523.)

24 There is no dispute Plaintiff's combat experience as a United
25 States Marine during the Vietnam war met the criteria for PTSD. The
26 only question is whether that condition resulted in limitations that
27 were disabling. It is undisputed Plaintiff successfully held a job
28 as a radiator mechanic with Seattle Transit/Metro for 25 years,

1 although he stated he self-medicated his symptoms during the first
2 15-20 years of work with alcohol, and routinely carried a gun for
3 protection. (Tr. at 530, 531.) Following anger outbursts, he was
4 sent by his employer to cultural diversity workshops. (Tr. at 530.)
5 He testified the last year of his employment was very difficult
6 because Asian employees and the influx of Asians in the Seattle
7 urban area would trigger PTSD symptoms, including flashbacks, anger
8 outbursts, and sleep deprivation which interfered with his
9 concentration. (Tr. at 534, 535.) Plaintiff retired early in
10 November 1999, a full year after being diagnosed by the VA with PTSD
11 and awarded full disability benefits.² As diagnosed by the VA
12 psychiatrist in 1997, Plaintiff symptoms included sleep deprivation,
13 emotional detachment, limited range of affect, and underlying
14 tension resulting in moderately severe to severe PTSD. (Tr. at
15 162.)

16 After retiring, Plaintiff moved immediately from Seattle to a
17 small farming community in Eastern Washington. He resumed
18 psychiatric care through the Spokane VA, including quarterly
19 psychiatric appointments with Dr. John Edwards and a two-year
20 counseling program with a veterans group. During his entire
21 treatment history with Dr. Edwards, Plaintiff's GAF ranged from 55
22 in February 2000 (Tr. at 205), to 65 and 57 in January 2001 (Tr. at
23 223, 430), 57 in June 2001 (Tr. at 257), 59 in February 2002 (Tr. at

25 ²It also is interesting to note that Plaintiff had multiple
26 coronary bypass surgery in 1995, yet returned to work for several
27 more years, and had a successful work history notwithstanding legal
28 blindness of his right eye. (Tr. at 150, 151.)

1 404), back to 53 in May 2002 (Tr. at 402), 52 in November 2002 (Tr.
2 at 375), 53 in February 2003 (Tr. at 366), 58 in May and November
3 2003 (Tr. at 353, 447), 55 in December 2003 (Tr. at 396), 65 in
4 April 2004 (Tr. at 482), and 60 in January 2004 (Tr. at 493). These
5 scores suggest a range of moderate limitations. DSM-IV at 32.
6 Additionally, Dr. Edwards opined in September 2004 Plaintiff would
7 have moderate limitations in ability to remember locations and work-
8 like procedures, understand, remember and carry out detailed
9 instructions, perform activities within a schedule, sustain ordinary
10 routine, and respond to changes in the work setting. He also noted
11 Plaintiff would have marked limitations in attention and
12 concentration, working in coordination with others, completing a
13 normal work day, responding appropriately to criticism, getting
14 along with peers and traveling in unfamiliar places. (Tr. at 505.)
15 This is the only medical opinion as to Plaintiff's ability to
16 function in the workplace, as opposed to socially or with respect to
17 activities of daily living.

18 Dr. Bostwick was unable to provide an opinion whether an
19 ability to function with respect to the B criteria (activities of
20 daily living, social interaction, attention, concentration or pace,
21 and episodes of deterioration, criteria at step two of the
22 sequential process) would translate to success in occupational
23 functioning. (Tr. at 593.) Dr. Bostwick also noted that stress in
24 the workplace could result in difficulty with controlling anger as
25 opposed to a non-work environment where retreat is possible. (Tr.
26 at 593.) Certainly, in Plaintiff's case, there is evidence retreat
27 has been an option he has relied upon to control symptoms. He
28 retired early from his job, left his home city of 25 years, has

1 discontinued involvement with the VFW, does not maintain alumni
2 contact with his VA counseling group, does not socialize with
3 friends or as a member of a club, and tries to "stay busy," all in
4 an effort to avoid triggering events. (Tr. at 547.) At the
5 supplemental administrative hearing, Plaintiff testified he had been
6 involved in a physical confrontation with a local judge who did not
7 fly the American flag after September 11 attacks. (Tr. at 538.) It
8 is also undisputed when confronted with Vietnam memories or when he
9 forgets his medication, his condition would deteriorate. (Tr. at
10 260, 379, 366, 408, 482, 493.)

11 Plaintiff was evaluated by Dr. Platner in 1999 and diagnosed
12 with moderately severe to severe PTSD, dysthymia secondary to PTSD
13 and a GAF of 55. (Tr. at 163.) Dr. Bostwick testified the
14 exacerbation of symptoms which was evident in 1999 would re-occur if
15 Plaintiff were returned to that work setting. (Tr. at 590.) Thus,
16 the factual basis for Dr. Bostwick's conclusion, that there is no
17 indication Plaintiff's condition deteriorated after he retired and
18 therefore his ability to work in 1999 remained a good indicator of
19 his ability to function in the workplace after November 1999 (Tr. at
20 518), is not supported by the evidence. Finally, Dr. Bostwick
21 admitted it was not uncommon for someone with PTSD to downplay their
22 symptoms because of emotional detachment and that certain events
23 could trigger an exacerbation of symptoms. (Tr. at 521.) Thus,
24 based on Dr. Bostwick's testimony, there is no evidence to support
25 the ALJ's opinion Plaintiff's condition was non-severe and/or that
26 he was capable of returning to his past relevant work at Seattle
27 Metro. At step five, the vocational expert testified that if
28 Plaintiff were prone to angry outbursts with a supervisor several

1 times a year or on a monthly basis with a coworker, such behavior
2 would be a detriment to successful work. (Tr. at 561.)

3 Case law requires an immediate award of benefits when,

4 (1) [there has been a failure] to provide legally
5 sufficient reasons for rejecting [a medical opinion], (2)
6 there are no outstanding issues that must be resolved
7 before a determination of disability can be made, and (3)
8 it is clear from the record that the ALJ would be required
9 to find the claimant disabled were such evidence credited.

10 *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir.), *cert. denied*, 531
11 U.S. 1038 (2000), citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th
12 Cir. 1996). The court has some flexibility in determining whether
13 to remand for an immediate award of benefits or for additional
14 administrative proceedings. *Connett v. Barnhart*, 340 F.3d 871, 876
15 (9th Cir. 2003). In light of the vocational experts' testimony about
16 workplace conduct, an immediate award is deemed appropriate.
17 Accordingly,

18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is
20 **GRANTED**; the captioned matter is **REMANDED** for an immediate award of
21 benefits.

22 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 13**) is
23 **DENIED**.

24 3. Defendant's Motion to file over-length brief (**Ct. Rec. 12**)
25 is **GRANTED**.

26 4. Any application for attorney fees shall be filed by
27 separate motion.

28 5. The District Court Executive is directed to file this
Order and provide a copy to counsel for Plaintiff and Defendant.
Judgment shall be entered for Plaintiff and the file shall be

1 **CLOSED.**

2 DATED May 17, 2006.

3 S/ CYNTHIA IMBROGNO
4 UNITED STATES MAGISTRATE JUDGE
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